Filed 6/4/04 In re Veronica R. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

In re VERONICA R., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. VERONICA R., Defendant and Appellant.	C042338 (Super. Ct. No. JD02328)

In this juvenile delinquency case, Veronica R. (the minor) was found to have participated in a vicious gang fight and was committed to the California Youth Authority (CYA) for a maximum term of 22 years 10 months.

On appeal, the minor contends the jurisdictional and dispositional hearings placed her in double jeopardy. She further contends there was insufficient evidence she personally inflicted great bodily injury on one of the victims and insufficient evidence of the predicate offenses necessary to support a gang enhancement. She also contends the juvenile court abused its discretion in committing her to the CYA.

Finally, she contends that because the juvenile court did not declare that the terms of the offenses and enhancements were to run consecutively, they must run concurrently.

Because we find no merit in any of the minor's arguments, we will affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Viewing the evidence in the light most favorable to the judgment, the minor was an active participant in a gang fight in Old Sacramento in April 2002. A group of people were leaving one of the bars at closing time when they were confronted by another group of people that included members of the Norteño street gang. A fight broke out. During the fight, Gerardo Lopez -- a member of the first group -- fell to the ground. As he lay on the ground, four females in the second group, including the minor, kicked him. As a result of the assault, Lopez suffered a concussion and developed aspiration pneumonia (most likely from inhaling his own blood). Another victim of the fight, Elizabeth Calderon, suffered a broken facial bone.

The fight broke up when the participants heard sirens. The four females who were seen kicking Lopez (including the minor) ran to a car but were stopped by police before they could drive away.

An amended delinquency petition was filed against the minor alleging three felony counts of assault by means of force likely to produce great bodily injury, two misdemeanor counts of attempting to commit a violent injury, and one misdemeanor count of falsely identifying herself to a police officer. Each of the

first five counts involved a different victim. In addition, the petition alleged a criminal street gang enhancement with respect to the three felony charges, and a great bodily injury enhancement with respect to two of those charges.

Following a contested jurisdictional hearing in Sacramento County, Judge Kenneth Peterson found almost all of the allegations in the amended petition true. The matter was transferred to Yolo County, the minor's county of residence, for disposition. Following a contested dispositional hearing, Judge Donna Petre committed the minor to the CYA for a maximum term of 22 years 10 months.

DISCUSSION

I

Double Jeopardy

This matter first came on for a jurisdictional hearing before Judge Brian Van Camp on May 13, 2002. Following a conference in chambers with counsel to discuss various matters, the court told the two witnesses who were present to testify to return the following day, and the matter was adjourned for the evening.

The next day, before any witness took the stand, the minor's counsel made an oral motion to dismiss the case for prosecutorial misconduct based on an alleged attempt by the prosecutor to speak with the minor about the case before trial without his knowledge or presence. The minor testified in support of the motion. Following the testimony of several other witnesses for both sides that stretched over several days, and

the argument of counsel, the court denied the motion. The prosecutor then moved to continue the hearing to allow time for completion of discovery, but the court denied that motion as well. Accordingly, the prosecutor moved to dismiss the case against the minor so he could refile it. The court granted that motion.

When the minor was arraigned several days later on the new petition, she entered a plea of once in jeopardy to all but one of the crimes charged. The minor's counsel subsequently filed a motion to dismiss on double jeopardy grounds, arguing the minor had been placed in jeopardy during the hearing on her motion to dismiss for prosecutorial misconduct and that jeopardy had attached when she was sworn and testified on that motion. The prosecution opposed the minor's double jeopardy motion on the ground the jurisdictional hearing had not been "entered upon" when the minor testified in support of her motion to dismiss. The court agreed with the prosecution, concluding the motion to dismiss for prosecutorial misconduct was "a separate incident [that] had nothing to do with the jurisdictional hearing."

"In proceedings before the juvenile court juveniles are entitled to constitutional protections against twice being placed in jeopardy for the same offense." (*Richard M. v. Superior Court* (1971) 4 Cal.3d 370, 375.) "A person is in legal jeopardy for an offense '"when (1) placed on trial (2) for the same offense (3) on a valid indictment or information or other accusatory pleading (4) before a competent court (5) with a competent jury, duly impaneled and sworn and charged with the

case; or, if the trial is by the court, it must be 'entered upon.'"' [Citations.] In a court trial jeopardy does not attach until the first witness has been sworn." (*Id.* at p. 376.)

The minor acknowledges "[t]he issue in this case is whether the jurisdictional [hearing was] 'entered upon' at the time of the swearing of [the minor] to testify regarding the alleged prosecutorial misconduct." She has failed to offer any persuasive argument or authority, however, supporting her position that it was.

This case is similar to *In re Donald L.* (1978) 81 Cal.App.3d 770, where, on the day calendared for a jurisdictional hearing before a juvenile court referee, the minor's counsel made an oral motion to suppress the evidence on the ground it was unlawfully seized. (*Id.* at pp. 772-773.) After hearing evidence, the referee granted the motion to suppress and dismissed the petition, but the juvenile court, on its own motion, ordered a rehearing of the suppression motion, ruled that the evidence had been lawfully seized, and denied the motion. (*Id.* at p. 772.) On appeal, the minor contended he was subjected to double jeopardy, but the appellate court disagreed, concluding the referee had "dismissed the petition before the jurisdictional phase of the hearing was 'entered upon,'" the minor "was not placed in jeopardy at the hearing before the referee, and thus the rehearing before the juvenile court judge did not constitute double jeopardy." (*Id.* at p. 773.)

Here, the minor was not placed in jeopardy at the hearing on her motion to dismiss for prosecutorial misconduct because the jurisdictional hearing was not "entered upon" until the first witness was sworn to testify *in the case against her*. The swearing of witnesses to testify in support of the minor's own motion to dismiss did not constitute "entry upon" the jurisdictional hearing because the minor's motion did not "expose[her] to a finding that [s]he be made a ward of the court as sought by the People" in the petition. (*Richard M. v. Superior Court*, *supra*, 4 Cal.3d at p. 378.) Thus, the minor's right to be free of double jeopardy was not violated.

II

Sufficiency Of The Evidence

A

Great Bodily Injury

The minor contends the evidence was insufficient to support one of the enhancements alleged on count one -- that she personally inflicted great bodily injury on Lopez. We disagree.

"When the sufficiency of the evidence is challenged on appeal, we apply the familiar substantial evidence rule. We review the whole record in a light most favorable to the judgment to determine whether it contains substantial evidence, i.e., evidence that is credible and of solid value, from which a rational trier of fact could find beyond a reasonable doubt that the accused committed the offense." (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 859.) "We must consider all of the evidence in the light most favorable to the prevailing party, giving that

party the benefit of every reasonable inference from the evidence tending to establish the correctness of the trial court's decision, and resolving conflicts in support of the trial court's decision." (*In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1373.) "[I]n juvenile cases, as in other areas of the law, the power of an appellate court asked to assess the sufficiency of the evidence begins and ends with a determination of whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, which will support the decision of the trier of fact." (*Ibid.*)

Under subdivision (a) of Penal Code section 12022.7, an additional three-year term of confinement may be imposed on "[a]ny person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony." "'[G]reat bodily injury' means a significant or substantial physical injury." (Pen. Code, § 12022.7, subd. (f).)

Here, the juvenile court believed Lopez suffered "great bodily injury" from the kicks he took to the face and head. The court also believed the minor "hovered over Mr. Lopez and [was] kicking him at least in the back of the head," although "there [was] insufficient evidence . . . [she was] kicking him in the front on his face." While the court was unable to determine whether the kicks inflicted by the minor, by themselves, resulted in the "great bodily injury" Lopez suffered, the court concluded the enhancement allegation was nonetheless true because the minor was "in a position where [her] act [wa]s such

an act that by itself could have caused the brain injuries [Lopez] suffered" and the minor "reasonably should have known that the cumulative effect of all of the force already given and [her] force would result in . . . great bodily injury to Mr. Lopez."

In sustaining the enhancement allegation, the juvenile court apparently relied on the 1999 revision to CALJIC No. 17.20, which was derived from *People v. Corona* (1989) 213 Cal.App.3d 589.[1] In *Corona*, the appellate court held "that when a defendant participates in a group beating and when it is not possible to determine which assailant inflicted which injuries, the defendant may be punished with a great bodily injury enhancement if his conduct was of a nature that it could have caused the great bodily injury suffered." (*Id.* at p. 594.)

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[1] As the same Court of Appeal recently explained: "CALJIC No. 17.20 was revised in 1999 based on our holding in *Corona*, *supra*, 213 Cal.App.3d 589, to include a fourth paragraph designed for use when there is a group beating and it is not possible to determine who caused what injury. That paragraph provides: 'When a person participates in a group beating and it is not possible to determine which assailant inflicted a particular injury, he or she may be found to have personally inflicted great bodily injury upon the victim if 1) the application of unlawful physical force upon the victim was of such a nature that, by itself, it could have caused the great bodily injury suffered by the victim; or 2) that at the time the defendant personally applied unlawful physical force to the victim, the defendant knew that other persons, as part of the same incident, had applied, were applying, or would apply unlawful physical force upon the victim and the defendant then knew, or reasonably should have known, that the cumulative effect of all the unlawful physical force would result in great bodily injury to the victim.' (CALJIC No. 17.20 (1999 rev.) (6th ed. 1996).)" (*People v. Banuelos* (2003) 106 Cal.App.4th 1332, 1337.)

The minor contends *Corona* was "wrongly decided," but offers no analysis to support that contention. Significantly, just last year, before the briefing in this case, the Court of Appeal which decided *Corona* reaffirmed that *Corona* "is still good law" because "the language of paragraph four of CALJIC No. 17.20 comport[s] with the intent of the Legislature to deter personal infliction of great bodily injury in the future by preventing that intent from being frustrated in cases where multiple assailants directly cause the great bodily injury." (*People v. Banuelos*, *supra*, 106 Cal.App.4th at pp. 1337-1338.) We find that reasoning persuasive, and the minor does not refute it. Accordingly, we conclude the juvenile court did not err in applying the *Corona* rule to this case.

The minor contends, however, that even if *Corona* was correctly decided, the evidence here was not sufficient to sustain the great bodily injury enhancement because there is no substantial evidence that her conduct was "of a nature that [by itself] it could have caused the great bodily injury [the victim] suffered." (*People v. Corona*, *supra*, 213 Cal.App.3d at p. 594.)

The minor does not dispute that one or more kicks to Lopez's head would have been sufficient to cause the "great bodily injury" he suffered (a concussion). Instead, her contention appears to be that there is no substantial evidence she kicked Lopez in the head, as the juvenile court found she did. Rather than show us, however, with specific citations to the record, that substantial evidence does not support the

court's finding, the minor simply argues that the "testimony at trial was wildly conflicting as to who did what to whom" and "the testimony reveals only speculation as to who committed which act." That argument is woefully inadequate to prove the insufficiency of the evidence.

A judgment challenged on appeal is presumed correct, and it is the appellant's burden to affirmatively demonstrate error. (*People v. $497,590 United States Currency* (1997) 58 Cal.App.4th 145, 152-153.) Thus, when a minor in a juvenile delinquency case claims insufficiency of the evidence to prove a sentencing enhancement, we presume the evidence of that enhancement was sufficient, and the minor bears the burden of convincing us otherwise. To do so, the minor must present her case to us consistently with the substantial evidence standard of review, set forth above. That is, the minor must set forth in her opening brief *all* of the material evidence on the disputed enhancement in the light most favorable to the People, and then must persuade us that evidence cannot reasonably support a true finding on the enhancement allegation. (See *People v. Dougherty* (1982) 138 Cal.App.3d 278, 282.) If the minor fails to present us with all the relevant evidence in the light most favorable to the People, then she cannot carry her burden of showing the evidence was insufficient because support for the enhancement may lie in the evidence she ignores.

Such is the case here. Judge Peterson specifically noted in his ruling that one of the witnesses -- Nereyda Lora -- made an in-court identification of the minor "as one of the people

she saw kicking" Lopez. During her testimony, Lora testified that she saw the minor repeatedly kicking Lopez in the left back side of his head as he lay on the ground. This portion of Lora's testimony -- which the minor completely ignores both in her sufficiency of the evidence argument and in her statement of facts -- constitutes substantial evidence supporting Judge Peterson's finding that the minor's conduct was of such a nature that, by itself, it could have caused the great bodily injury suffered by Lopez. Thus, the minor's challenge to the sufficiency of the evidence on the great bodily injury enhancement fails.

B

Predicate Offenses For Gang Enhancement

The minor next argues the evidence was insufficient to prove the predicate offenses necessary to establish the gang enhancement. She is wrong.

Subdivision (b) of Penal Code section 186.22 (section 186.22(b)) provides enhanced punishment for certain gang-related crimes. "[T]o subject a defendant to the penal consequences of [section 186.22(b)], the prosecution must prove that the crime for which the defendant was convicted had been 'committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.' (§ 186.22, subd. (b)(1) and former subd. (c).) In addition, the prosecution must prove that the gang (1) is an ongoing association of three or more persons with a common name or

common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a 'pattern of criminal gang activity' by committing, attempting to commit, or soliciting *two or more* of the enumerated offenses (the so-called 'predicate offenses') during the statutorily defined period. (§ 186.22, subds. (e) and (f).)"[2] (*People v. Gardeley* (1996) 14 Cal.4th 605, 616-617.)

The minor contends that because the predicate offenses must have been committed by gang members,[3] and because she was not a gang member at the time she participated in the gang fight, the offenses she committed that night could not be used to establish the predicate offenses and therefore there was insufficient evidence of the requisite predicate offenses. The People contend there are four "problems" with that argument. We find the first "problem" the People identify sufficient to rebut the minor's argument.

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[2] To fall within the "statutorily defined period," at least one of the predicate offenses must have occurred "after the effective date" of the gang enhancement statute, and the last of the predicate offenses must have occurred "within three years after a prior offense." (Pen. Code, § 186.22, subd. (e).)

[3] In *People v. Augborne* (2002) 104 Cal.App.4th 362, 375, the appellate court held "that the prosecutor need not demonstrate that the two or more individuals who committed the predicate crimes were gang members *at the time* the offenses were committed." Without analysis, the minor contends *Augborne* was "wrongly decided." Because we conclude the minor's argument fails for another reason, we need not address *Augborne*.

One of the premises of the minor's argument -- that "at the time of the [gang fight], she was not a gang member" -- is based on the testimony of Woodland Police Officer Robert Strange, the prosecution's gang expert. Officer Strange testified on direct examination that based on her school disciplinary reports and her involvement in the gang fight, it was his opinion that the minor "was an active Norte Street gang member." On cross-examination, the minor's counsel asked Officer Strange if his opinion would change "if it was shown that she was not part of this fight?" Officer Strange said it would.

From this testimony, the minor reasons -- correctly -- that "but for her involvement in the current offenses, [Officer Strange] would not [have] deem[ed] her a gang member." From this proposition, however, the minor then reasons that Officer Strange's testimony established "that at the time of the offenses, she was not a gang member." The minor's reasoning is flawed. That the minor's participation in the gang fight was part of the basis for Officer Strange's opinion that she was a gang member does *not* mean Officer Strange believed she became a gang member only *after* the gang fight. Rather, the common sense interpretation of the evidence is that the minor's participation in the gang fight, along with previous incidents from her disciplinary record at school, demonstrated to Officer Strange that the minor was a member of the Norteño street gang *at the time* of the fight. Accordingly, the minor's challenge to the gang enhancement fails.

III

Commitment To The CYA

The minor contends Judge Petre abused her discretion in committing the minor to the CYA because there was insufficient evidence that CYA commitment would probably benefit the minor and that less restrictive programs would be inappropriate or ineffective. We disagree.

"A juvenile court's commitment order may be reversed on appeal only upon a showing the court abused its discretion. [Citation.] '"We must indulge all reasonable inferences to support the decision of the juvenile court and will not disturb its findings when there is substantial evidence to support them."'" (*In re Robert H.* (2002) 96 Cal.App.4th 1317, 1329-1330.) "To support a CYA commitment, it is required that there be evidence in the record demonstrating probable benefit to the minor, and evidence supporting a determination that less restrictive alternatives are ineffective or inappropriate." (*In re Teofilio A.* (1989) 210 Cal.App.3d 571, 576.)

The minor does not actually offer any argument on the first issue -- probable benefit from the CYA commitment. Instead, her argument is aimed at the second issue -- less restrictive alternatives would be ineffective or inappropriate. On that point, she contends "a ranch, group home, or Juvenile Hall," would have been "sufficient to protect the community and rehabilitate" her. In making her argument, however, the minor (once again) disregards the substantial evidence standard of review. Instead of reciting the evidence in the record that

supports the CYA commitment -- primarily, the case planning report by Deputy Probation Officer Garey White -- and explaining why that evidence is nonetheless insufficient to support confinement in the CYA, the minor recites only evidence that displays her in a positive light and the recommendation of her own expert against CYA commitment. She then dismisses the contrary evidence from the probation officer by simply stating that "[n]othing about [his] testimony overshadows" the positive evidence about her and her own expert's recommendation.

Just as with the great bodily injury enhancement, however, substantial evidence supporting the CYA commitment can be found in the evidence the minor ignores. Probation Officer White explained in his case planning report that he was "highly disturbed" by the circumstances of this case. He noted the minor "displayed a total disregard towards human safety and ignored basic moral standards of our society by assaulting the primary victim as he was already face down on the street and said to have been unconscious. Due to the mere number of victims in this incident, it appears the minor involved herself in a situation which was brutal in nature and was done with malice and severe disregard for human life." He also noted that the minor continued to deny any involvement in the incident and showed no real remorse, despite the serious injuries the victims suffered. Based on these factors, he concluded anything less restrictive than CYA commitment would be inappropriate for the minor: "A person who ignores the common moral value of society and puts themselves in a position to do harm to others, such as

[the] minor . . . did, should not be allowed in the community with law abiding citizens, where another citizen could be a target of violence by her and her gang associates."

In committing the minor to the CYA, Judge Petre agreed with the probation officer, concluding a "least [*sic*] restrictive environment would not be appropriate due to the lack of remorse and the severity of this unprovoked attack" and because the minor "present[s] a great risk to our community." Evaluating Judge Petre's exercise of discretion, as we must, "with punishment and public safety and protection in mind" (*In re Lorenza M.* (1989) 212 Cal.App.3d 49, 58), we find no abuse of discretion in her commitment of the minor to the CYA. Given the viciousness of the minor's crime -- participating in a gang fight by kicking a victim who was helpless on the ground -- and her continued refusal to accept responsibility for her actions and lack of remorse, it was more than reasonable for Judge Petre to conclude that any less restrictive alternative than confinement in a CYA facility would not appropriately punish the minor for her conduct or effectively protect the public from her. (See *In Re Michael D.* (1987) 188 Cal.App.3d 1392, 1397 [affirming commitment to the CYA following admission to one count of sexual battery where "[t]he crime committed was brutal and violent," the minor's actions "exhibit[ed] a shocking callousness which require[d] appropriate treatment and guidance," and the minor exhibited an "unrepentant and cavalier attitude following his detention and arrest"].) There was no abuse of discretion.

IV

Consecutive Terms

Citing *In re Robert S.* (1979) 92 Cal.App.3d 355, the minor argues that because "the juvenile court never declared that the terms imposed for the current offenses were to be run consecutively," "this Court must order that the terms be imposed concurrently." The People agree. We do not.

In *Robert S.*, the juvenile court found the minor had committed two counts of tampering with a vehicle. (*In re Robert S.*, *supra*, 92 Cal.App.3d at p. 359.) The CYA commitment order fixed a term of six months for each of those two counts; however, "[n]either the oral proceedings, the minute order nor the order of commitment to CYA ma[d]e clear whether the juvenile court intended to impose consecutive or concurrent terms of potential confinement for [those] violations." (*Id.* at pp. 359, 364.) This court concluded that "any doubt as to whether the court, in fixing the maximum permissible period of confinement, intended the terms for multiple offenses to run consecutively or concurrently must be resolved in favor of the minor." (*Id.* at p. 364.) Accordingly, we held "that in computing the maximum period of confinement, the two six-month terms are to run concurrently." (*Ibid.*)

This case is distinguishable from *Robert S.* because here the order of commitment to the CYA signed by Judge Petre expressly specifies a "maximum period of confinement" of 22 years 10 months, which is the aggregate of all the terms to which the minor was subject based on the charges and

enhancements sustained against her. The minor acknowledges that this maximum period of confinement "results [only] if the terms are run consecutively." Nevertheless, she contends -- without citation to any supporting authority -- that the CYA commitment order "cannot replace an indication by the court at the dispositional hearing that it intends" to run the terms consecutively.

We disagree that the CYA commitment order is insufficient to demonstrate the juvenile court's intent. In *In re Robert S.*, we specifically noted that "commitment order [was] ambiguous on its face with respect to whether the two six-month terms for vehicle tampering [we]re to run consecutively or concurrently," and nothing in the oral proceedings or minute order resolved that ambiguity. (*In re Robert S.*, *supra*, 92 Cal.App.3d at pp. 363-364.) Here, even if the oral proceedings and minute order can be deemed ambiguous, the commitment order certainly cannot be. By signing a commitment order that expressly provided for a maximum period of commitment of 22 years 10 months, Judge Petre unequivocally demonstrated her intent to run the terms consecutively rather than concurrently.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

BLEASE, Acting P.J.

DAVIS, J.